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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 STEPHANIE CLIFFORD a.k.a.
13 STORMY DANIELS a.k.a. PEGGY
14 PETERSON, an individual,

15 Plaintiff,

16 v.

17 DONALD J. TRUMP a.k.a. DAVID
18 DENNISON, an individual,
19 ESSENTIAL CONSULTANTS, LLC, a
20 Delaware Limited Liability Company,
21 MICHAEL COHEN, an individual, and
22 DOES 1 through 10, inclusive,

23 Defendants.

Case No. 2:18-CV-02217-SJO-FFM

**DEFENDANT ESSENTIAL
CONSULTANTS LLC'S
REPLY BRIEF RE MOTION
TO DISMISS PLAINTIFF'S
DECLARATORY RELIEF
CAUSE OF ACTION FOR
LACK OF SUBJECT
MATTER JURISDICTION
PURSUANT TO FRCP
12(b)(1)**

[Declaration of Brent H. Blakely Filed
Concurrently Herewith]

Assigned to the Hon. S. James Otero
Action Filed: March 6, 2018

Date: December 3, 2018
Time: 10:00 a.m.
Location: 350 West 1st Street
Courtroom 10C, 10th Floor
Los Angeles, CA 90012

1 **A. Plaintiff’s Complaint Seeks Rescission of the Settlement Agreement**

2 To “rescind” is to abrogate, annul, void, or cancel a contract and to put an end
3 to it as though it never were. *Black’s Law Dictionary* (10th Ed. 2018). A “rescission”
4 amounts to the unmaking of a contract, or an undoing of it from the beginning, and
5 not merely a termination. *Id.*; *Sessions v. Meadows*, 13 Cal. App. 2d 748. In
6 California prior to 1961, the Civil Code provided for two methods by which a party
7 could obtain recessionary relief: an action to enforce a rescission and an action to
8 obtain a rescission. *Runyan v. Pac. Air Disus.* (1970) 2 Cal. 3d 304, 311-312. In
9 1961 the Legislature made significant changes to California’s rescission procedures,
10 abolishing the action to obtain court rescission and treating rescission solely as a
11 remedy. *Id.* at 313; *Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 70. Both
12 the grounds for rescission and the means by which parties may rescind their contract
13 are governed by Civ. Code, §1688 *et seq.*

14 Civil Code § 1691 provides in pertinent part that “when notice of rescission
15 has not otherwise been given or an offer to restore the benefits received under the
16 contract has not otherwise been made, the service of a pleading in an action or
17 proceeding that seeks relief based on rescission shall be deemed to be such notice or
18 offer or both. *See also, Santa Clara Waste Water Co. v. Allied World National*
19 *Assurance Co.* (2017) 18 Cal. App. 5th 881, 888; *Resure, Inc. v. Superior Court*
20 (1996) 42 Cal.App.4th 156, 164, 166–167

21 Clifford’s First Cause of Action seeks “a judgment declaring that no agreement
22 was formed between the parties, or in the alternative, to the extent an agreement was
23 formed, it is void, invalid, or otherwise unenforceable.” (Dkt. No. 14, pg. 18)
24 Plaintiff’s argument that her declaratory relief claim is not governed by Civil Code
25 §§ 1688 *et. seq.*, because the actual word “rescission” is not specifically mentioned,
26 is misguided. “It is not necessary for such a party to use the word “rescind” in order
27 to accomplish what the cases intend by the use of that term.” *Pearson v. Brown*
28 (1915) 27 Cal. App. 125, 132. Any appropriate words, or any definite acts will

1 suffice. *Id.* A party seeking rescission must simply indicate the intention to treat the
 2 contract as ended. *McNeese v. McNeese* (1923) 190 Cal. 402, 405. Plaintiff's
 3 complaint expressly alleged numerous grounds entitling her to rescind the Settlement
 4 Agreement. There can be no doubt as to the intention of Plaintiff to consider the
 5 contract at an end. *Hull v. Ray* (1930) 211 Cal. 164, 167; *Larson v. Warner Bros.*,
 6 2013 U.S. Dist. LEXIS 39158 *15 (C.D. Cal. March 20, 2013); *Wilson v. Lewis*
 7 (1980) 106 Cal. App. 3d 802, 809.

8 **B. The Settlement Agreement Has Been Extinguished and a New Contract**
 9 **Formed to Restore the Benefits**

10 Because Plaintiff's claim for declaratory judgment seeks relief based on
 11 rescission, by the express terms of Civ. Code § 1691 it is construed as notice of
 12 rescission and a statutory offer to restore any benefits Plaintiff received. Civil Code
 13 § 1691; *Santa Clara Waste Water Co. v. Allied World National Assurance Co.* (2017)
 14 18 Cal. App. 5th 881, 888. Essential Consultant's ("EC") acknowledgement of the
 15 rescission and acceptance of Plaintiff's offer to return the \$130,000 (ECF No. 79)
 16 resulted in the following:

17 A) the Settlement Agreement was extinguished (Civil Code §§ 1688 &
 18 1689(a)) thereby eliminating any need for judicial scrutiny as to whether the
 19 rescission had been properly accomplished, *Paulerena v. Superior Court* (1965) 231
 20 Cal. App. 2d 906, 913-914 ("The defendants by letter, and by pleading, accepted the
 21 rescission. Under the circumstances, the trial court properly concluded that by virtue
 22 of the facts and the pleading before it no issue respecting the accomplished rescission
 23 was pending."); and

24 B) A new contract was formed whereby Plaintiff agreed to return to EC the
 25 \$130,000 paid to her in consideration. Civil Code § 1691; *Harriman v. Tetik* (1961)
 26 56 Cal. 2d 805, 801 ("Mutual rescission involves the formation of a new contract.");
 27 *In re Warrack Medical Center Hospital*, 282 F. Supp. 988, 990 (N.D. Cal. 1968) (A
 28 rescission can be effected by the mutual consent of the parties, and when this is done,

1 it is treated like any other type of contract).

2 **C. There is No Prevailing Party for the Purpose of Fees**

3 As discussed above, when EC accepted the rescission of the Settlement
4 Agreement it eliminated any need for judicial scrutiny as to whether the rescission
5 had been properly accomplished. *Paulerena* at 913-914. It would have been an
6 entirely different situation had the case been decided on its merits – but it never got
7 that far. EC’s acceptance of the rescission mooted any dispute concerning the
8 validity of the now extinguished Settlement Agreement.¹ There is no determination
9 on the merits, no prevailing party, and Civil Code § 1717 is inapplicable.

10 The cases cited by Plaintiff involve scenarios where a rescission had already
11 occurred, and the rescinding party prevailed in an action seeking restitution of the
12 consideration given pursuant to the original agreement. For instance, in *Hastings v.*
13 *Matlock* (1985) 171 Cal. App. 3d 826, the parties entered into an agreement for the
14 sale of land and the construction of a residence. After construction of the house, the
15 buyer refused to pay. The seller sued for restitution and rescission, and the parties
16 entered into a settlement agreement. At trial, the court found in favor of seller on the
17 settlement agreement and awarded specific performance and attorney's fees.

18 *Hastings* and the other cases cited by Plaintiff stand for the counterintuitive
19 proposition that a party seeking enforcement of rescission to obtain the return of
20 restitution can, if they receive a judgment in their favor, obtain attorneys’ fees if the
21 underlying contract provided for same. For example, if EC were to bring an action
22 against Plaintiff for the return of the \$130,000, the prevailing party in that subsequent
23 action would be entitled to attorney’s fees. There is, however, a crucial distinction
24 between a situation where a party obtains a judgment enforcing a rescission and the
25

26 ¹ “Federal district courts appear uniform in denying fees under Section 1717
27 where a non-merits decision results in dismissal of the contract claim.” *Vistan Corp.*
28 *v. Fadei USA, Inc.*, 2013 U.S. Dist. LEXIS 47799 *7-8 (N.D. Cal. April 2, 2013);
Garzon v. Varese, 2011 U.S. Dist. LEXIS 4250 (C.D. Cal. Jan. 11, 2011)

1 current situation where the parties have both accepted the rescission of the Settlement
2 Agreement thereby eliminating subject matter jurisdiction.

3 As California's Supreme Court discussed at length in *Hsu v. Abbata* (1995) 9
4 Cal. 4th 863 there first must be a final adjudication of the litigants' respective rights
5 before a court can ascertain whether there is a prevailing party under Civil Code
6 §1717. *Hsu* at 876 (The prevailing party determination is to be made only upon final
7 resolution of the contract claims); *See also, Bank of Idaho v. Pine Avenue Associates*
8 (1982) 137 Cal. App. 3d 5, 15-16.

9 Under Federal Rule of Civil Procedure 54(d), when a final judgment has been
10 entered in a case, the "prevailing party" may make a motion for attorney's fees and
11 costs. Fed. R. Civ. Proc. 54(d). However, controlling Ninth Circuit authority dictates
12 that a defendant is not considered a "prevailing party" when dismissal is mandated by
13 a lack of subject matter jurisdiction. *Miles v. State of California*, 320 F.3d 986, 988
14 (9th Cir. 2003). Thus, fees and costs under Federal Rule of Civil Procedure 54(d)
15 may not be awarded where an underlying claim is dismissed for lack of subject
16 matter jurisdiction. *Id.*; *see also, Idea Place Corp. v. Fried*, 390 F. Supp. 2d 903 (no
17 prevailing party under § 1717 when court dismissed claim for lack of subject matter
18 jurisdiction.); *Russell City Energy Co., LLC v. City of Hayward*, 2015 U.S. Dist.
19 LEXIS 26626 **6-15 (N.D. Cal. Feb. 17, 2015) (same); *HSBC Bank USA v. DJR*
20 *Props.*, 2011 U.S. Dist. LEXIS 41650 **4-7 (E.D. Cal. April 12, 2011) (action
21 dismissed for mootness, depriving court of subject matter jurisdiction, therefore no
22 prevailing party under § 1717).

23 As discussed at length in EC's moving papers, Plaintiff has only alleged a
24 single cause of action concerning the Settlement Agreement: declaratory relief
25 seeking a judgment that no agreement was formed. (ECF No. 14) Once Plaintiff gave
26 notice of rescission via the filing of this lawsuit and EC accepted same, the contract
27 was undone and there was nothing left to litigate. §§ 1688 & 1691. EC's Covenant
28 Not to Sue removed any question; Plaintiff's declaratory relief claim was rendered

1 moot, there was no longer any active case and controversy, thereby mandating
 2 dismissal for lack of subject matter jurisdiction. As *Miles* requires, there can be no
 3 prevailing party under FRCP 54(d) and neither party can seek their respective
 4 attorney fees pursuant to the now extinguished Settlement Agreement.

5 **D. Whether the Settlement Agreement is Void Due to Illegality is Moot**

6 Unlike *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), which
 7 involved an unaccepted proposal of a stipulated injunction, in the present case the
 8 “remedy” is self-executing. As just discussed, EC’s acceptance of Plaintiff’s notice of
 9 rescission (along with EC’s covenant not to sue) deprived this Court of subject matter
 10 jurisdiction over her claim for declaratory relief. Furthermore, EC’s acceptance of
 11 Plaintiff’s statutory offer of restoration (Civil Code § 1691) gave rise to a new
 12 obligation independent from the underlying agreement, which has been extinguished
 13 (Civil Code § 1688).

14 Plaintiff’s original claim for declaratory relief, which is now moot, is distinct
 15 from a claim (such as breach of contract) to enforce the return of restitution pursuant
 16 to Civil Code § 1692. EC, which has demanded the return of the \$130,000 pursuant
 17 to this new agreement, has yet to bring a claim for breach of contract against Plaintiff
 18 seeking restitution. For her part, Plaintiff has not identified or otherwise made any
 19 demand to EC that it restore any purported consideration.

20 Plaintiff’s Opposition is emblematic of her approach to the entire case, to make
 21 a mountain out of a molehill. At the end of the day the Court should look at the First
 22 Amended Complaint, which sets forth the claims at issue, and they are very simple—
 23 Plaintiff asked for the Settlement Agreement to be undone, EC agreed, end of story.

24 Dated: November 7, 2018

BLAKELY LAW GROUP

25 By: /s/ Brent H. Blakely

26 Brent H. Blakely

27 Jessica C. Covington

Attorneys for Defendants

EC, LLC and Michael Cohen